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Supreme Court of the United States

OCTOBER TERM, 1943.

(No. 1082.)

EASTERN WINE CORPORATION,

Petitioner,

—against—

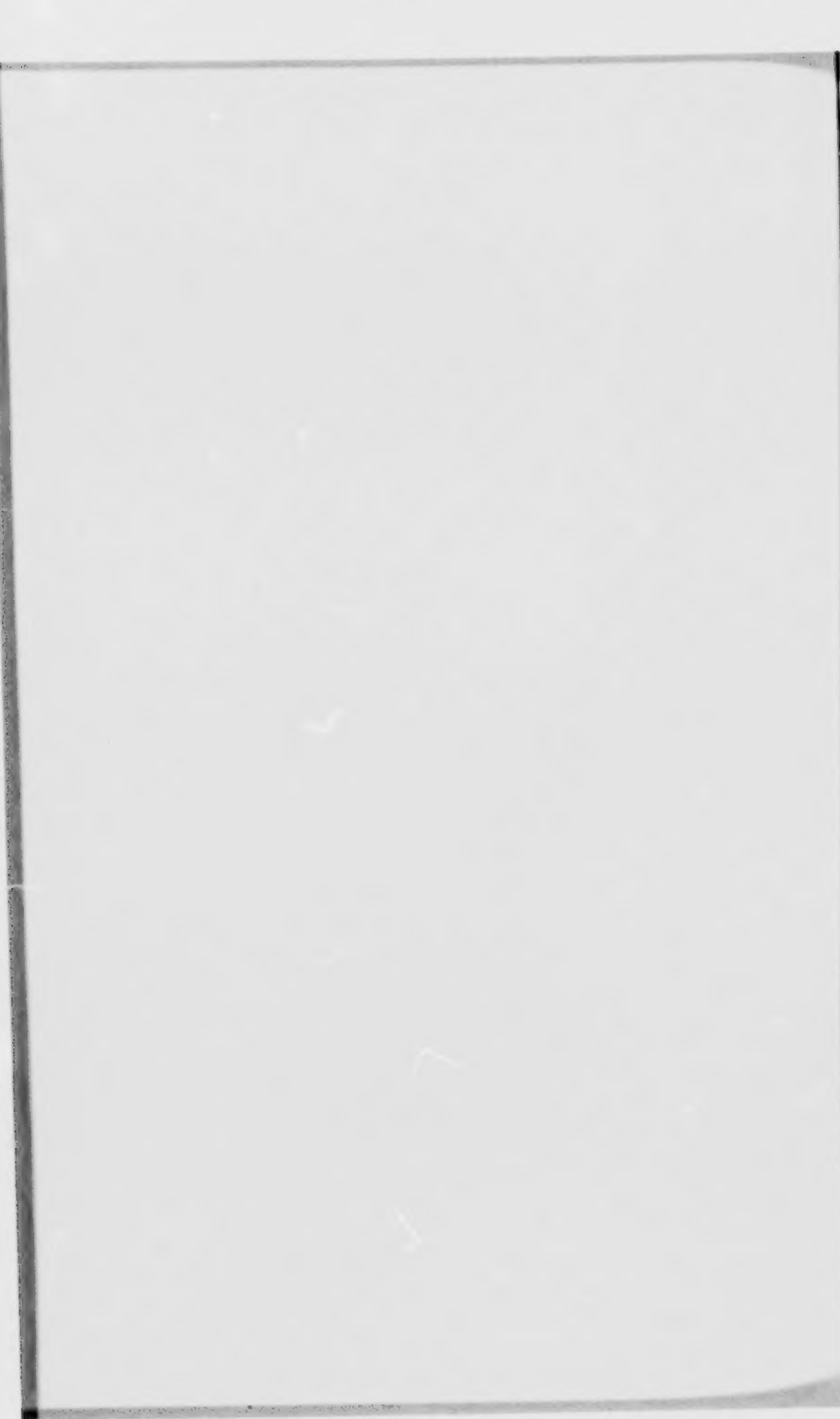
G. H. MUMM CHAMPAGNE (Societe Vinicole de Champagne,
Successors) AND ASSOCIATES INCORPORATED, and SOCIETE
VINICOLE DE CHAMPAGNE,

Respondents.

BRIEF FOR THE RESPONDENTS IN OPPOSITION.

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INDEX.

| | PAGE |
|------------------|------|
| Facts | 1 |
| Argument | 2 |
| Conclusion | 6 |

LIST OF AUTHORITIES:

| | |
|---|------|
| Baker v. Schofield, 243 U. S. 114 | 3 |
| Goodyear Tire & Rubber Co., Inc. v. Ray-O-Vac. Co., 2-28-44, 88 Law Ed. 475, 476 | 3 |
| Lamar v. Micon, 112 U. S. 452 | 5 |
| Scandinavian Belting Co. v. Asbestos & Rubber Works of America, 257 Fed. 644, certiorari denied 250 U. S. 644 | 3, 5 |
| Second Russian Ins. Co. v. Miller, 297 Fed. 404, aff'd. 268 U. S. 552 | 5 |
| Sutherland v. Mayer, 271 U. S. 272 | 5 |
| Tennessee Coal, Iron & Railroad Co. v. Muscoda Local No. 123 (Mar. 27, 1944), 88 Law Ed. 610, 618 | 3 |
| Ward v. Smith, 7 Wall 447 | 5 |
| Williams Mfg. Co. v. United Shoe Machinery Corp., 316 U. S. 364 | 3 |
| Williams v. Paine, 169 U. S. 55 | 5 |

STATUTES:

| | |
|---|---|
| Trade Mark Statute, 15 U. S. C. A. 96 | 5 |
| Trading with the Enemy Act, 50 U. S. C. A. | 4 |



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STATEMENT.

We are adding this brief statement of the case to supplement the petitioner's statement.

FACTS.

The plaintiff Mumm Company of Delaware (hereinafter called Domestic Plaintiff) is the exclusive representative in the Eastern United States for the sale of Mumm champagne, produced by the plaintiff Societe Vinicole de Champagne (hereinafter called French Plaintiff). The French Plaintiff owns 53% of Domestic Plaintiff's common stock, and all its preferred stock.

About January, 1941 (when the French Plaintiff had been for over six months in the hands of the German invaders), the Defendant began to use on its champagne bottles the diagonal red stripe which had been for many years the distinguishing feature of Mumm's famous "Cordon Rouge"

brand, and Defendant continued this use despite the prompt and specific written protest of the Domestic Plaintiff (R. 108-113).

Thereafter Domestic Plaintiff, in its own behalf and in behalf of the French Plaintiff, sued the Defendant in the Federal District Court for trademark infringement and unfair competition. The District Court granted summary judgment to both Plaintiffs for an injunction and an accounting—for infringement as to the French Plaintiff and unfair competition as to the Domestic Plaintiff. This judgment was unanimously affirmed by the Second Circuit Court of Appeals.

Both Courts held as follows:

(1) Defendant was guilty of trademark infringement as to the French Plaintiff and unfair competition as to the Domestic Plaintiff, and should be enjoined as to both; and should also account to both plaintiffs, any payment to the French Plaintiff, however, to be made only after the war and on further order of the Court.

(2) The Domestic Plaintiff, as exclusive agent, had a sufficient interest to enable it to sue in its own behalf for unfair competition.

(3) The Domestic Plaintiff had authority to sue in behalf of the French Plaintiff for infringement.

ARGUMENT.

THE CASE INVOLVES PURELY QUESTIONS OF FACT, WHICH WERE CORRECTLY DECIDED BY BOTH LOWER COURTS IN PLAINTIFFS'S FAVOR.

It is not altogether clear whether the petition here seeks to review only the injunction and accounting for trademark infringement in favor of the French Plaintiff, or in addition the injunction and accounting in favor of the Domestic Plaintiff.

However, there seems to be no basis for seeking a review of the concurrent finding that petitioner competed unfairly with the Domestic Plaintiff, as to which the District Court said (R. 25) :

"The defendant's course of conduct is a patent evasion, is calculated to mislead the public, and subject the domestic plaintiff to irreparable injury in respect to the unsold product of the Producer which it has on hand and which it has expended large sums of money to advertise and market. Clearly this makes out a case of unfair competition."

The Circuit Court of Appeals summarized a longer analysis as follows :

"As we have just said, after the defendant's present make-up was challenged, there could no longer be any defense against deliberate imitation."

Both Courts found that petitioner's objection that the Domestic Plaintiff has no interest to protect "is without substance" (R. 25, 118-119). The Circuit Court of Appeals cited with approval its earlier holding in *Scandinavian Belting Co. vs. Asbestos & Rubber Works of America*, 257 Fed. 937 (in which this Court denied certiorari, 250 U. S. 644), "that a person in the Delaware company's position had enough interest to register the trademark as its own" (R. 119).

As often stated by this Court, its well settled rule is not to disturb concurrent findings of fact by two courts in the absence of very exceptional showing of error. *Baker vs. Schofield*, 243 U. S. 114, 118; *Williams Mfg. Co. vs. United Shoe Machinery Corp.*, 316 U. S. 364, 367; *Goodyear Tire & Rubber Co., Inc. vs. Ray-O-Vac Co.* (Feb. 28, 1944), 88 Law ed. 475, 476; *Tennessee Coal, Iron & Railroad Co. vs. Muscoda Local No. 123* (March 27, 1944), 88 Law ed. 610, 618.

But it would seem that petitioner's three alleged reasons for certiorari as to the French Plaintiff's judgment have no better footing than would a petition to review the judgment for unfair competition as to the Domestic Plaintiff. All three reasons depend solely on the Domestic Plaintiff's authority to sue in the French Plaintiff's behalf—a single narrow question of fact, which has also been determined against the petitioner by the concurrent findings of the Courts below. Both District Court and Circuit Court of Appeals correctly decided that the Domestic Plaintiff had this authority, and could continue to exercise it under the express authority of Sec. 10(g) and (h), Title 50, U. S. Code.

This extremely narrow question, whether the petitioner, already subject to injunction and accounting in favor of the Delaware Plaintiff, may be relieved of possible additional accountability to the French Plaintiff, would seem to be peculiarly unsuitable to induce this Court to grant certiorari. Nor has the conduct of the petitioner as found by the Courts herein been such as to entitle it to exceptional consideration.

The three cases cited in petitioner's brief at page 7 "to sustain the jurisdiction" do not seem in point.

The William Bagaley, 72 U. S. 377, dealt with the general effect of war on partnerships between citizens of the opposing belligerents, but can have no bearing on a suit specifically permitted by statute, as here, to be prosecuted by an enemy alien. (Sec. 10(g) and (h), Title 50, U. S. Code.)

In *Mishawaka Mfg. Co. vs. Kresge Co.*, 316 U. S. 203, this Court declined to review the factual extent of infringement found by the lower Courts, but did review and reverse the rule of law laid down by them as to the measure of damages for infringement, as being unduly favorable to the wrongdoer. The establishment of the correct rule of damages was naturally of great public importance, governing as it doubtless would the majority of cases of this kind, including the present one. But the extent of infringement, as of authority in the present case, was a pure question of fact, dependent on the peculiar circumstances of each individual case.

The third case cited by petitioner, *Green vs. Electric Vacuum*, 319 U. S. 777, seems irrelevant, for there the petition for certiorari was withdrawn before it was acted on.

The French Plaintiff is not an indispensable party. Domestic Plaintiff since the year 1933, has been and continues to be the sole and exclusive agent and source of origin for goods in the eastern portion of the United States, for the importation and sale of champagne bearing the trade mark. It purchases the champagne outright, without comment or commission. With full title vested in it, sales of the product are its own; it is known as the exclusive source and origin for the goods. Under these circumstances Domestic Plaintiff is "owner" of the mark and may sue in its own name, as held in *Scandinavian Belting* case, *supra*, this Court denying certiorari. French Plaintiff is a proper party but not a necessary or indispensable party; and within the meaning of the trade mark statute (15 U. S. C. A. Sec. 96) Domestic Plaintiff is "owner" of the trade mark in issue.

Domestic Plaintiff is agent for French Plaintiff; both Courts below considered it as having authority to sue in its own name and in behalf of its principal. The agreement (R. 70) establishes all elements of an agency. Domestic Plaintiff agrees to import champagne exclusively from the other, while the latter agrees to sell exclusively to the former, Domestic Plaintiff agrees "to devote its best efforts to the sale of wines in this country and in every way to promote a demand for such goods" in this country. Both Courts deemed Domestic Plaintiff bound by the elementary principles of agency implied authority to make its principal a party to the action.

This agency was not terminated by war. The decisions of this Court have uniformly held the existence of war does not terminate an agency of this kind. *Williams vs. Paine*, 101 U. S. 55, 70, 73; *Sutherland vs. Mayer*, 271 U. S. 272, 273; *Second Russian Ins. Co. vs. Miller*, 297 Fed. 404, (aff'd. 100 U. S. 552), *Ward vs. Smith*, 7 Wall. 447, 452-453, *Lamar vs. Fricou*, 112 U. S. 452, 464.

The provisions of the Trading with the Enemy Act expressly provide the French Plaintiff may maintain this

action. Section 10(g) provides "Any enemy * * * may institute and prosecute suits * * * to enjoin infringement of * * * trade mark * * * in the United States * * *" and Section 10 (h) provides "All powers of attorney granted by an enemy * * * to any person within the United States, in so far as they may be requisite to the performance of acts authorized in subsections (a) and (g) [above] shall be valid."

CONCLUSION.

This petition should be denied as it presents none other than facts already determined by both the District and Circuit Courts. Without conflict in decisions, this Court is respectfully urged to affirm these factual findings of the Circuit Court.

Respectfully submitted,

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